Supreme Court, U.S.
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No. 94-1202

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

JAMES MOTTOLA,
PETITIONER,

vs.

TAWA AYENI AND KAYODE AYENI,
RESPONDENTS.

ON PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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March 1995

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I.

QUESTION PRESENTED

Whether it was clearly established, and a reasonable law enforcement officer would have believed, that an officer was violating the Fourth Amendment to the Constitution when he permitted private individuals, under the imprimatur of a search warrant, to enter private property without the residents' consent and to conduct a search and effect seizures for purposes that were unrelated to any legitimate law enforcement activity.

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STATEMENT OF THE CASE

This case arises from an incident occurring on March 5, 1992 involving video and audiotaping by CBS television of the execution of a search warrant by Secret Service and other law enforcement agents in the private home of Babatunde Ayeni and his wife and then five year old son, Respondents Tawa and Kayode Ayeni. Respondents ("the Ayenis") were home in their apartment in Brooklyn, New York at the time of the search. They are suing Petitioner Secret Service Agent James Mottola ("Mottola") for civil damages resulting from his violation of their Fourth Amendment rights arising from his admitted entry into their home with the media in tow under the auspices of a search warrant.[1]

The facts alleged in the First Amended Complaint, accepted as true and found to be undisputed by the Second Circuit, establish the following series of events. On March 5, 1992, Mottola obtained a search warrant based upon information provided by a confidential informant that Babatunde Ayeni was engaged in credit card fraud. The warrant authorized Mottola and "any Authorized Officer of the United States" to enter the Ayenis' apartment to search for "fraudulently obtained credit cards" and other, documentary

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[1] At the time of the proceedings in the District Court, the unknown Secret Service agents and Postal Inspectors who participated with Mottola in the search had not yet been served with a complaint. The Government, pursuant to an order by the District Court, thereafter disclosed the names of the unknown agents. Filing of an Amended Complaint identifying the agents is being held in abeyance by the District Court pending this Court's determination of Mottola's Petition. Mottola was thus the sole defendant for purposes of the appeal to the Second Circuit Court of Appeals. Furnishing the agents names is the only discovery permitted to this point. The case is stayed pending resolution of the instant petition.

evidence of credit card fraud. (Am. Compl. P. 24.)[2] Neither Mrs. Ayeni nor Kayode was under investigation for any illegal activity.[3]

Prior to March 5, 1992, the Secret Service had effected an agreement with CBS, Inc. permitting the network to send its employee Meade Jorgenson ("Jorgenson") and a camera crew along on the search warrant execution at the Ayeni home. Jorgenson was a producer of a weekly CBS television news magazine called "Street Stories." This agreement and the plan to take a media news crew along on the search had been concealed from the Magistrate Judge who approved the search warrant. Mottola does not dispute that the CBS camera crew and Jorgenson were unnecessary to the execution of the search warrant.

At approximately 6:00 p.m. on March 5, 1992, six armed agents arrived without a warrant at the Ayeni apartment where Mrs. Ayeni and her son were home alone. The agents called through the Ayenis' closed door that they were "police" conducting an investigation and wanted to ask questions. When Mrs. Ayeni, clothed only in a dressing gown, cracked open the door, one agent pushed her in the chest to move her away from the door while two other agents pushed open the door. The agents then entered the apartment. As several of the agents rushed into the bedroom and started searching in the closets, Mrs. Ayeni asked to see a warrant. One of the agents told her they were waiting for other agents to bring the

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[2] "Am. Compl." refers to the First Amended Complaint.

[3] Federal agents Mirandized Mrs. Ayeni although she was not under suspicion or investigation or ever charged with any crime. (See Joint Appendix ("J.A.") filed in support of the appellate briefing before the Second Circuit, at pages 178-180, Affidavit of Tawa Ayeni.)

warrant. Mottola was not present with this first group of agents; he was obtaining the warrant and may have been communicating with them by radio.

At approximately 7:50 p.m., nearly two hours after the initial entry, the agents were notified by radio that the warrant had just been signed. It is possible they were notified by Mottola who was in charge of the search. The agents then commenced an aggressive search. At approximately 8:15 p.m., Mottola entered the apartment with three additional armed agents. He ushered in a CBS news crew, including Jorgensen, a camera operator, and a sound technician. Neither Jorgenson nor the crew were ever identified to Mrs. Ayeni, who believed they were part of the team of agents executing the warrant. No permission for their presence was ever given by the Ayenis.

Mrs. Ayeni immediately objected to the videotaping, trying to avoid it by covering her and Kayode's faces with a magazine. Kayode sat on the couch crying and told his mother he was frightened. When Mrs. Ayeni tried to shield her son's face, Mottola grabbed the magazine out of her hand, threw it on the floor, and told the Ayenis to "shut up." Mottola or one of the other armed agents directed the CBS crew to videotape Mrs. Ayeni, who repeatedly requested that their pictures not be taken.

While CBS video and audiotaped Mrs. Ayeni and her child, the agents questioned Mrs. Ayeni regarding her husband's whereabouts and how they had paid for several expensive wristwatches the agent had found in the apartment. The CBS crew followed and taped the agents as they searched the apartment and the Ayenis' belongings. They took close-up pictures of the interiors of closets, personal letters, personal financial records, family pictures, and even of a homey maxim

about marriage hanging on the wall. Throughout the search, Jorgensen, the CBS producer, interviewed an agent wearing a wireless microphone provided by the CBS crew. In the foyer of the Ayeni apartment, the CBS crew elicited from this agent his views on the modus operandi of people who commit credit card fraud and the tools of their trade. During the sequence of the tape, the agent "implied the complicity of other residents of the Ayeni apartment." (Am. Compl. P. 37.)

After about 20 minutes of taping, the CBS crew left the premises with Mottola and several agents. The crew videotaped one of the departing agents expressing disappointment that no evidence of credit card fraud had been found. The remaining agents did not complete the search until approximately 9:35 p.m., more than three and one-half hours after the initial entry and an hour after the camera crew left. The only material seized from the apartment was a family photograph of the Ayenis, also videotaped by CBS.

Mrs. Ayeni's husband, Babatunde, was subsequently indicted for credit card fraud. The District Court (the Honorable Jack B. Weinstein, presiding) denied CBS' Motion To Quash Mr. Ayeni's subpoena for the videotape of the search. United States v. Sanusi et al., (E.D.N.Y.1992). Mrs. Ayeni and Kayode thereafter instituted a Federal civil action for damages against Mottola, other Unknown Agents and Postal Inspectors, CBS Inc. and Meade R. Jorgensen, citing constitutional violations under this Court's decision in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 404 n.5, 91 S.Ct. 1999, 2009 n.5, 29 L.Ed.2d 619 (1971). The Ayenis alleged also common law tort claims against the CBS defendants, as well as claims for

injunctive and declaratory relief.[4]

The CBS defendants admitted they had permission from the Secret Service and Department of Justice to videotape the execution of the search warrant in the Ayeni apartment. The Secret Service admitted giving permission, stating CBS had been "let along on a number of outings" with the agents "in the field." (App. Opp. Brf. p. 12-13 and referenced record citations.)[5] CBS entered with the agents under the warrant's authority. CBS received permission in the criminal case to obscure the identity of its "confidential informant on the version of the tape produced," one of the agents who participated in the search of the Ayeni apartment. This "confidential informant" was Mottola. (Ibid.) Neither Mottola nor CBS claims that CBS was assisting Mottola and the agents in execution of the warrant.

The Second Circuit Court of Appeals, in a published opinion, affirmed the District Court's denial of Mottola's motion to dismiss the complaint, rejecting as a matter of law his claim of qualified immunity from civil suit under the Bivens case for his involvement in the media's illegal entry into the Ayeni home and participation in the search under color of Federal authority. Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994); Ayeni v. CBS, Inc., 848 F.Supp. 362 (E.D.N.Y. 1994). The issue of the presence of unauthorized persons during the search of the Ayeni home is only one of the issues addressed by the Second Circuit. The Second Circuit upheld

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[4]The Ayenis have since entered a confidential settlement with the CBS defendants, Jorgenson and CBS, Inc.

[5]"App. Opp. Brf" refers to Appellees' Opposing Brief filed in response to Mottola's Opening Brief on appeal to the Second Circuit Court of Appeals.

constitutional claims based on the extent of the agents' use of physical force, the intrusiveness and excessiveness of the search, and the agents' entry, detention and search prior to obtaining the warrant. The Court found that unresolved material issues of fact remained for the jury to decide with respect to these issues. 35 F.3d at 688-691. (App. p. 14a - 21a.)[6] The Second Circuit found also that the video and sound recordings made by CBS and the Government agents were "seizures" under the Fourth Amendment, and rendered the search excessively intrusive. 35 F.3d at 688. (App. p. 15a - 16a.) Mottola does not seek review as to these aspects of the Second Circuit's decision in this Court.

Mottola's Petition concerns only the Second Circuit's decision that he could not claim qualified immunity for his conduct in bringing CBS along on the search. The Second Circuit concluded that (1) "Mottola exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. A private home is not a soundstage for law enforcement theatricals...," and (2) "... an objectively reasonable officer could not have concluded that inviting a television crew or any third party not providing assistance to law enforcement -- to participate in a search was in accordance with Fourth Amendment requirements." 35 F.3d at 686. (App. p. 10a.)

REASONS FOR DENYING THE WRIT

Mottola claims his petition should be granted because the Second Circuit failed to apply correct standards in determining

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[6] "App." refers to the Appendix filed by Mottola in support of his Petition.

the existence of "clearly established" law, and its approach conflicts with the approach of other Circuits. Mottola is wrong. Contrary to Mottola's assertions, there are no conflicting, controlling appellate court decisions, either from the Second or other Circuits, which the Second Circuit should have, but failed to consider. The case law Mottola cites as the basis for his claim consists of two, unpublished District Court and one State Court decision from other jurisdictions which had no legal significance in the Second Circuit's analysis. Rather, the Second Circuit followed the controlling and important appellate decisions which fully support its decision.

Moreover, the conflict among the Circuits Mottola claims exists is based on his erroneous representation that the Second Circuit relies only on its own law and the law of this Court to determine whether a constitutional right has been "clearly established." The Second Circuit does not engage in such a practice and did not do so in this case, instead considering important and controlling decisions from this Court, the Second Circuit and other jurisdictions, which is the appropriate procedure.

For these reasons and the reasons stated below, Mottola's Petition should be denied.

ARGUMENT

THE SECOND CIRCUIT RELIED ON WELL-DEVELOPED PRINCIPLES OF CONSTITUTIONAL LAW IN FINDING IT "CLEARLY ESTABLISHED" THAT AN OFFICER'S USE OF A SEARCH WARRANT TO PERMIT UNAUTHORIZED INDIVIDUALS TO ENTER PRIVATE PROPERTY, SEARCH AND SEIZE FOR NO LAW ENFORCEMENT PURPOSE VIOLATES THE FOURTH AMENDMENT.

Mottola does not dispute that his conduct exposed him to prosecution for criminal trespass under New York State law and for violation of 18 U.S.C. § 3105, as well as common law causes of action such as trespass and conversion. Nor does Mottola challenge the Second Circuit's conclusion that his conduct was unconstitutional, only that when he brought CBS along on the search, the then existing law did not clearly establish that his conduct was unconstitutional. Mottola's argument is unfounded and does not merit Supreme Court review.

Government officials performing a discretionary function are immune from liability for civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person should have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). This Court, in Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987), delineated the parameters controlling the inquiry into whether the claimed Constitutional right was "clearly established" at the time of the officer's alleged actions and whether a reasonable officer would have been aware of the right:

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that

> an official action is protected by qualified immunity unless the very action in question has previously been held unlawful...[Citation omitted]; but it is to say that in light of pre-existing law the unlawfulness must be apparent...[Citation omitted.]".

The Anderson Court recognized further that even where the right has been found to be "clearly established," the official may still be immune from suit if he can show he was objectively reasonable in mistakenly concluding that his acts were constitutional. Id.

The Anderson test permits finding a clearly established right even where an earlier decision is not directly on point with the current facts. See Mitchell v. Forsyth, 472 U.S. 511, 535 n.12., 105 S.Ct. 2806, 2820 n.12, 86 L.Ed.2d 411 (1985). In Mitchell this Court concluded,

> "We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances..."

In Shabazz v. Coughlin, 852 F.2d 697, 701 (2d Cir. 1988), the Second Circuit concluded that in the absence of a decision on point, the Court must look for the presence of cases "foreshadowing" a ruling on the issue. In Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303, 305 (5th Cir. 1987), the Fifth Circuit found that a court does not have to find "...precedent which is factually on all-fours with the case at bar....It suffices that the [agent] be aware of general well-developed legal principles." The approach taken by these circuits is entirely consident with the Anderson Court's admonition that raising "extremely abstract rights" to the level of "clearly established" rights would result in an officer's "virtually unqualified liability." Anderson v. Creighton, supra, 483 U.S. at 639, 107 S.Ct. at 3039.

At the outset, the issue before the Second Circuit was purely a question of law. See Elder v. Holloway, __U.S.__, 114 S.Ct., 1019, 1023, 127 L.Ed.2d 344 (1994). Mottola does not ask that any of the Court's findings be remanded for jury resolution, arguing only that the Court's legal rulings that his conduct violated clearly established law and that a reasonable officer would have been aware that his conduct was unconstitutional, were erroneously based on general or abstract principles. Because the Second Circuit's decision is correctly based on controlling time-hewn legal principles which for years have been the accepted guidelines for reviewing law enforcement officers' actions in the context of the Fourth Amendment, Mottola's Petition should be denied.

At the time the Second Circuit ruled, there were not yet any decisions specifically holding that an agent who allows the media into a private home to participate in execution of a search for non-governmental purposes violates the Constitution. Such "on all fours" precedent was not, however, required. Mottola's conduct was "...so far from then well established acceptable constitutional behavior that no case law precedent was needed to alert him to the fact that the execution of a warrant for the benefit of private persons violated the Constitution...." Ayeni v. CBS Inc., supra, 848 F.Supp. at 368.[7]

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." Entering a private home without consent pursuant to a search warrant is a power "exclusively reserved to the State." Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). The touchstone for analyzing whether governmental action violates the Fourth Amendment is thus

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[7]District Judge Weinstein compared Mottola to a "rogue policeman" using his official position to steal from a private home. Id.

whether that action was "reasonable."

As the Second Circuit correctly noted, the reasonableness requirement applies both to the decision whether to conduct a search and to the manner and scope of the search and seizure that is carried out. 35 F.3d at 684. (App. p. 6a.) The controlling case law defining the general inquiry for determining reasonableness has made clear over the years that government officials' discretion in their execution of a search warrant is limited to either,

> (a) actions expressly authorized by the warrant...or (b) such further actions as are impliedly authorized because they are reasonably related to accomplishing the search authorized by the warrant or accomplishing legitimate law enforcement objectives...."

35 F.3d at 685. (App. p. 8a.)

In articulating these principles, the Second Circuit cited to and relied on the decisions of this Court, as well as its own decisions and those of the Ninth and D.C. Circuit Courts of Appeals. Id.; see Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989); see also Tennessee v. Garner, 471 U.S. 1, 7-8, 105 S.Ct. 1694, 1699-1700, 85 L.Ed.2d 1 (1985); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 394 n.7, 91 S.Ct. 1999, 2004 n.7, 29 L.Ed.2d 619 (1971); United States v. Matias, 836 F.2d 744, 747 (2d Cir. 1988); United States v. Crozier, 777 F.2d 1376, 1381 (9th Cir. 1985); United States v. Heldt, 688 F.2d 1238, 1260 (D.C. Cir. 1981), cert. denied, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982); Delaware v. Prouse, 440 U.S. 648, 654-655, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979). The law thus clearly held at the time of Mottola's performance that intrusions into a private dwelling by law enforcement agents must be authorized, either expressly by the warrant or impliedly in furtherance of a legitimate law enforcement

purpose. Mottola's actions here are not even claimed to have been authorized by the warrant or other circumstances.

These restrictions limiting an officer's discretion insofar as it concerns an officer's non-consensual entry into a private home are rooted in the privacy element of the Fourth Amendment. The Second Circuit, relying on this Court's decisions, explained that,

> 'The protection of privacy from encroachment by government officials is the "'principal object' of the [Fourth] Amendment.'....The home has properly been regarded as among the most highly protected zones of privacy....'

35 F.2d at 684-685, citing Soldal v. Cook County, __U.S.__, 113 S.Ct. 538, 545, 121 L.Ed.2d 450 (1992) [citing Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648-49, 18 L.Ed.2d 782 (1967)]; Winston v. Lee, 470 U.S. 753, 758, 105. S.Ct. 1611, 1615, 84 L.Ed.2d 662 (1985); and additional citations; see also Griswold v. Connecticut, 381 U.S. 479, 484, 85 S.Ct. 1678, 1681-1682, 14 L.Ed.2d 510 (1965); Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886). Under these clearly enunciated principles of Constitutional law, it is manifest that Mottola's unauthorized actions violated the Ayenis' constitutional right to be free from governmental intrusion into their private home and lives. A law enforcement officer would have been aware of these principles and it would have been apparent to the officer that unauthorized actions such as those undertaken by Mottola were constitutionally deficient.

Mottola does not contend (nor could he) that his actions were expressly authorized by the warrant. The warrant identified the premises to be searched, the items to be examined and seized and those who could conduct the search. In this instance the warrant authorized only Mottola and "...any Authorized Officer of the United States" to conduct a search

for evidence of credit card fraud. Ayeni v. Mottola, supra, 35 F.3d at 685. Nor does Mottola contend that his actions in bringing unauthorized private persons into the Ayeni home were impliedly authorized because they were in furtherance of any legitimate law enforcement purpose. It is not disputed that Mottola and the Secret Service brought the CBS crew and Jorgenson along on the search in order to help them obtain video and audiotaped material for the TV newsmagazine "Street Stories." Accordingly, it was clear under the controlling legal principles discussed above, and Mottola should have known, that his conduct was unconstitutional.

The analysis need not, although it could, stop here. At the time Mottola took CBS along on the search, there also existed factually comparable controlling Federal appellate case law applying these principles and statutes which further establish that his actions were unconstitutional. Cases interpreting the legal principles discussed ante have found that the authority of law enforcement officials to enter private property, created expressly or impliedly by warrant or statute, does not include their bringing unauthorized individuals along to participate in or conduct a search and effect seizures. Such an illegal entry and search violates the Fourth Amendment. See United States v. Sanchez, 509 F.2d 886 (6th Cir. 1975); see also United States v. Hare, (6th Cir. 1979); United States v. Warren, 550 F.2d 219 (5th Cir.), cert. denied, 434 U.S. 1016, 98 S.Ct. 735, 54 L.Ed.2d 762 (1978).

In Sanchez, state officers with a warrant to search for narcotics learned there might also be explosives present on the property to be searched. They asked an agent from the Bureau of Alcohol, Tobacco and Firearms ("ATF") to assist in searching for the explosives. The ATF agent, although he had the time, did not obtain a separate, Federal warrant to search for explosives. The agents found explosives, but no narcotics. The Sixth Circuit suppressed the explosives, finding that the Federal agent's unauthorized presence on the property was unconstitutional. 509 F.2d at 889. The basis for the Court's

decision was that the ATF agent did not have "...aright to be on the premises." Id. at 890.[8] In Warren, the Fifth Circuit suppressed evidence of narcotics where DEA agents, suspicious of narcotics smuggling, boarded a vessel with the Coast Guard without a search warrant claiming justification under the latter's authority to make safety inspections. The Court found the search and seizure by the DEA unconstitutional because, (1) the Coast Guard was not authorized to delegate its authority to inspect to other branches of the government, and (2) the DEA agents had no authority to board the ship. 550 F.2d at 225.[9]

That Mottola's actions violated the Fourth Amendment is also supported by statutory requirements. 18 U.S.C. § 3105 (1988) provides,

> "A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its

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[8]The Sanchez Court's decision has been criticized by other courts insofar as it is based on the Court's finding that the ATF agent had time to obtain a warrant yet failed to do so prior to entering the property. See, e.g., United States v. Johnson, 707 F.2d 317, 320-323 (8th Cir. 1983). The cases criticizing Sanchez do not disagree with the Court's finding that such actions are unconstitutional, only with the reasoning supporting the Court's conclusion that the ATF agent had not been authorized to enter and search.

[9]In Bills v. Aseltine, 958 F.2d 697 (6th Cir. 1992), decided after the Ayeni search, officers executing the warrant invited a private security guard to conduct an inspection of the private dwelling they controlled subject to the search. In Bills, the Court concluded that issues "concerning the manner in which the search warrant was executed turned on factual questions that should have been submitted to the jury". Id. at 705. The Court did, however, support the proposition that permitting the presence of a third party not assisting in the search violates the Constitution and based that rationale in part on the prior Sanchez decision.

execution."

Although the statute uses the word "serve" and not "execute," it has been construed to apply to both actions. See United States v. Wright, 667 F.2d 793, 797 (9th Cir. 1982); United States v. Clouston, 623 F.2d 485, 486 (6th Cir. 1980); United States v. Gervato, 474 F.2d 40, 45 (3d Cir.), cert. denied, 414 U.S. 864, 94 S.Ct. 39, 38 L.Ed.2d 84 (1973). The Second Circuit found Mottola "clearly violated Section 3105." 35 F.3d at 687.

The Second Circuit correctly relied on 18 U.S.C. § 3105 as providing "some basis for giving content to the [Fourth] Amendment's generalized standard of reasonableness...," likening the provision to 18 U.S.C. § 3109 (the "knock and announce statute"), the requirements of which a majority of circuits have concluded "coincide with the reasonableness requirements of the Fourth Amendment." 35 F.3d at 687 and n.9 (App. p. 11a - 13a.) The cases surveyed by the Second Circuit construing Section 3105 establish that "the presence of a third party who is assisting authorized officers in their search does not violate the Fourth Amendment's reasonableness requirement...[[10]]." 35 F.3d at 687. (Emphasis included). For example, in United States v. Clouston, 623 F.2nd 485, 486-487 (9th Cir. 1980), the Sixth Circuit found that the presence of telephone company employees at a search in a private residence was constitutional because the employees were assisting the officers and thus authorized under 18 U.S.C. § 3105 to be present and act in execution of the warrant. Id. at 1091. These decisions accept and enforce the statute's clear prohibition: no person other than authorized agents and properly designated private parties necessary for the warrant's

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[10] See United States v. Clouston, 623 F.2d [485] at 486-87...[6th Cir. 1980]; United States v. Gambino, 734 F.Supp. 1084, 1091 (S.D.N.Y. 1990)...; cf. In re Southeastern Equipment Co. Search Warrant, 746 F.Supp. 1563, 1577 (S.D. Ga. 1990)...; United States v. Schwimmer, 692 F.Supp. 119, 126-27 (E.D.N.Y. 1988)....

execution may be present. They and Section 3105 clearly notified Mottola of the wrongfulness of his conduct.

Federal Rule of Criminal Procedure 41, enacted in 1948, provides an additional basis for interpreting the Fourth Amendment's reasonableness requirement as excluding the actions undertaken by Mottola. Rule 41, which regulates the issuance of search warrants, has been interpreted by the courts for the proposition that no unauthorized persons may assist in executing the warrant except in situations of exigency or necessity. See, e.g., New York Telephone Co. v. United States, 434 U.S. 159, 98 S.Ct. 364 (1971).[11]

Conversely, the presence of a third party not assisting authorized officers would violate the Fourth Amendment. This conclusion is fully in accord with the test for determining whether law has been "clearly established" enunciated by Anderson and Harlow. The Seventh Circuit, interpreting this test, concluded in Donovan v. City of Milwaukee, 17 F.3d 944, 952 (7th Cir. 1994),

> "In the absence of controlling authority on point, 'we seek to determine whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.'"

Under the controlling authorities discussed above, it was inevitable that when faced with a fact pattern such as that presented by Mottola's conduct, a Court whose decisions are broadly controlling would recognize that such conduct violates the Fourth Amendment. Indeed, the fact that the

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[11]Federal Rule of Criminal Procedure 41(c) directs that a search warrant be directed "to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof...[and] shall command the officer to search...."

unauthorized private parties brought by the officer along on the search are members of the media who video and audiotaped the Ayenis, illegally seizing their statements and images of them, their home and their personal effects, renders the finding of constitutional violation even more compelling. The Second Circuit made the following poignant observation:

> "The unreasonableness of Mottola's conduct in Fourth Amendment terms is heightened by the fact that, not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect -- the right to privacy. The purpose of bringing the CBS camera crew into the Ayenis' home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right to privacy."

35 F.3d at 686.

Mottola simply ignores the mountain of authorities clearly establishing the right claimed by the Ayenis. In order to establish his claim that the right had not been clearly established and that he could not have reasonably been aware his actions violated the Constitution, Mottola relies on unsubstantiated factual assertions and the existence of irrelevant, non-binding precedent. Mottola cites to articles and publications to substantiate his otherwise unsupported factual assertion that 'conventional news programs and less traditional reality-based "cop shows" filmed all types of police action, including the execution of search warrants in private residences.' (Pet. p. 8-9.) These articles and publications are not, however, part of the record and should not be considered by this Court. See New Haven Inclusion Cases, 399 U.S. 392, 450 n.66, 90 S.Ct. 2054, 2088 n.66, 26 L.Ed.2d 691 (1970). Nor is there anything else in the record to support Mottola's factual assertion.

Moreover, that Mottola's actions may have been "common place" is irrelevant to establish whether a reasonable law enforcement officer would have known he was breaking the law, when the unlawfulness of the officer's actions is obvious under the clearly established law. Indeed, Mottola does not dispute that in undertaking such actions, other officers were committing State and Federal crimes and exposing themselves to civil suits for numerous common law causes of action. At least one State court decision in New York, the very jurisdiction where Mottola was operating, had held that such trespassory conduct violates the Constitution. A New York Court, in a published 1981 opinion deciding that the officers in question had committed trespass by authorizing the media to enter private property under a search warrant, noted:

> "If the news media were to succeed in compelling an uninvited and non-permitted entry into one's private home whenever it chose to do so, this would be nothing less than a general warrant, equivalent to the writs of assistance which were so odious to the American colonists. William Pitt, later Lord Chatham, found this unchecked intrusion so offensive to a free people that he denounced it in words which again bear repetition:
>
> > 'The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail--its roof may shake--the wind may blow through it--the storm may enter--the rain may enter--but the King of England cannot enter!'"

Anderson v. WROC-TV, 109 Misc. 2d 904, 441 N.Y.S.2d 220, 226, 7 Media L.Rep 1987 (Sup.Ct. Monroe Co. 1981).

The real thrust of Mottola's argument, however, lies in his reliance on irrelevant, distinguishable case law from other

jurisdictions which has no precedential or controlling value in the Federal court system. Higbee v. Times-Advocate, 5 Med.L.Rptr. 2372 (S.D. Ca. 1980) (unpublished); Moncrief v. Hanton, 10 Med.L.Rptr. 1620 (N.D. Oh. 1984) (unpublished); Prahl v. Brosamle, 98 Wis.2d 130, 295 N.W.2d 768 (Wis.App. 1980). Mottola asserts that these decisions should be followed because the facts in them are closely analogous to the facts of this case. He further asserts that the courts in these cases held that "the presence of news media at the execution of a search warrant does not violate the Fourth Amendment." (Pet. p. 5.)

Mottola then draws the conclusion that the decisions of the Supreme Court and the lower Federal Circuit Courts, including those discussed ante, are too "general" to "clearly establish" the law because the facts in those cases are not as "on point" as the facts in the less controlling decisions he cites. Mottola then parlays this reasoning into the position that his Petition should be granted so this Court can make the following determination: Whether courts, in determining "clearly established" law, must ignore controlling decisions and follow decisions by courts of inferior jurisdiction, whether unpublished, distinguishable or contrary to controlling constitutional principles, if the facts of the latter decisions are more closely analogous to the case being decided. Mottola's argument is unsupported by the case law and logically flawed.

In presenting his claim, Mottola mistakenly assumes that the words "clearly establish" require court decisions that are "on all fours" with the case being decided. As discussed above, the Supreme Court cases and controlling lower court decisions interpreting these words have no such requirement. See Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) (the "very action in question...[need not have] previously been held unlawful,....[I]n light of preexisting law the unlawfulness must be apparent...."); see also Shabazz v. Coughlin, 852 F.2d 697, 701 (2d Cir. 1988); Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303, 305 (5th Cir. 1987); Boswell v. Sherburne County, 849 F.2d. 1117, 1121 (8th Cir.),

cert. denied, 488 U.S. 1010, 109 S.Ct. 796, 102 L.Ed.2d 787 (1989); Donovan v. City of Milwaukee, 17 F.3d 944, 952 (7th Cir. 1994). The controlling law set forth above establishes that at the time Mottola threw open the Ayenis' home and private lives to the media under the pretext of a search warrant, the Fourth Amendment prohibited him from enlisting unauthorized individuals to participate in execution of a search warrant in a private home for no legitimate official purpose. The existence of controlling case law identifying such unauthorized individuals as members of the media would not have made the constitutional violation any clearer. Thus, Mottola's assertion that the law followed by the Second Circuit was unduly "general" is misplaced.

Mottola is also incorrect in asserting that the case law he cites should have been considered by the Second Circuit in its analysis, or that its consideration would have obscured the clearly established constitutional principles on which the Court relied. Initially, although the Second Circuit does not cite to the cases relied on by Mottola, this does not mean it failed to consider them. Regardless of the role they played in the Court's analysis, the Court was right not to rely on them. Higbee v. Times-Advocate, 5 Med.L.Rptr. 2372 (S.D. Ca. 1980) and Moncrief v. Hanton, 10 Med.L.Rptr. 1620 (N.D. Oh. 1984) are unpublished trial court opinions with no precedential value. The decision not to publish these decisions manifests an intention by those courts not to establish the law. Rather, these decisions indicate merely the resolution of a contested litigation and affect only those litigants. It would, in fact, be unreasonable for any Federal Court to purport to rely upon opinions the authors of which have determined will not be made available for use as precedent or, in fact, be known at all absent accidental discovery.[12]

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[12]It is compelling to note that the Sixth and Ninth Circuit Rules preclude or disfavor citation of unpublished opinions of those Circuits except for establishing "res judicata, estoppel, or the law of the case." Sixth Circuit

Even if these decisions were published, their precedential value would be generally limited to subsequent decisions by their respective courts. A District Court decision "will not ordinarily '"clearly establish" the law even of its own circuit, much less that of other circuits.'" Woodward v. City of Worland, 977 F.2d 1392, 1397 (10th Cir.), cert. denied, __U.S.__, 113 S.Ct. 3038, 125 L.Ed.2d 724 (1993), citing to Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees § 9.20, at 537 (2d ed. 1991). A District Court decision is not binding precedent for decisions of other District Courts. Rather, a District Court is bound by decisions of the Court of Appeals of the Federal Circuit where it sits. See Fox v. Arcadia State Bank, 937 F.2d 1566, 1570 (11th Cir. 1991).

Indeed, even if the unpublished decisions cited by Mottola were controlling authority in their jurisdictions, which they are not, a reasonable officer in New York would not have been aware of them; officers are reasonably expected to be aware of controlling law that is either national in scope or more local, thus more directly controlling of the officer's actions. It is the existence of these cases which Mottola claims rendered the law less than "clearly established" at the time he invaded the Ayenis' home with CBS. Thus, Mottola cannot satisfy either aspect of the first prong of the Anderson test, i.e., lack of clearly established law of which a reasonable officer would have been aware.

These cases were also decided erroneously under the then existing clearly established principles of Constitutional law. The Court in Moncrief found there was no violation of the plaintiffs' "right to privacy under the Fourth Amendment by allowing the media to enter their premises along with the police" because it erroneously concluded that a constitutional violation required violation of the privacy right underlying non-

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Rule 24(c); See Ninth Circuit Rule 36-3.

Fourth Amendment case law, e.g., Roe v. Wade, 410 U.S. 113, 93 S.Ct. 715, 35 L.Ed.2d 147 (1973). The Court related the privacy right claimed by the Moncrief plaintiffs to a "general right of privacy" unrecognized by the Constitution. The Higbee decision also turned erroneously on an unduly restrictive characterization of the privacy right violated by the intrusion of the media under color of a Federal search warrant. These decisions were clearly erroneous under this Court's decisions cited ante which confirm that a right of privacy is firmly rooted in the Fourth Amendment. Decisions of this Court holding as such which were rendered after Moncrief and Higbee supersede those decisions, further destroying any relevance they may have had. See, e.g., Winston v. Lee, supra, 470 U.S. at 758, 105 S.Ct. at 1615; Soldal v. Cook County, supra, 113 S.Ct. at 545.

Mottola's reliance on the State case of Prahl v. Brosamle, 98 Wis.2d 130, 295 N.W.2d 768 (Wis.App. 1980) is also improper. In Prahl a Wisconsin appellate court found it was not unreasonable for a newscaster to film, then televise, the search of a shooting suspect's residence located in the same building as offices and a laboratory. There was no previous agreement between the government and the media to allow participation by the media in the search, and the police did not invite or directly participate in the filming. Even if Prahl were applicable factually to this case, which it is not, it would not be controlling on the issue of whether a Federal Constitutional right had been clearly established at the time of the challenged actions. Cf. Oregon v. Hass, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 (1975)(State cannot, as a matter of Federal Constitutional law, impose restrictions on law enforcement greater than those rejected by Supreme Court.)

Nor does Mottola's apparent need for precise factual identity work any better in relation to the second prong of the test for qualified immunity -- the requirement that the officer have been reasonably aware that his actions were unconstitutional. This case is not like cases where

determination of the appropriateness of an officer's challenged acts depends upon the set of specific circumstances surrounding them, e.g., the use of force in effecting an arrest. For example, it would not necessarily be clear that shooting a suspect during an arrest always constitutes excessive force. Under those circumstances the inquiry must focus on the circumstances surrounding the arrest and whether the officer was reasonably aware that his conduct under those circumstances was unconstitutional.

Here, Mottola's conduct fell within an entire category of behavior which the law has clearly established to be unconstitutional -- using his authority under a search warrant to permit unauthorized, private individuals to enter a private residence and participate in the search for no legitimate law enforcement purpose related to execution of the warrant. Under the controlling law, there are no circumstances under which this behavior could be deemed constitutional. Mottola's interpretation of the words "clearly established" would render most law enforcement officials unaccountable for obviously unconstitutional conduct unless that precise conduct had been found unconstitutional. Such a result demeans the integrity of the law enforcement process by giving a "green light" to plainly unconstitutional conduct which has not yet been brought to the attention of the court.

Mottola has thus failed to establish that the Second Circuit decided an "important question of Federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Supreme Court Rule 10.1(c). His Petition should be denied.

THIS CASE DOES NOT PRESENT FOR REVIEW APPLICATION OF A LEGAL PRINCIPLE THAT IS SUBJECT TO A CONFLICT IN THE CIRCUIT COURTS OF APPEAL.

Mottola claims as a further ground for review by this Court the existence of a conflict in the Circuit Courts of Appeal "on the proper sources of legal authority to be used in ascertaining whether a particular right has been clearly established for purposes of overcoming a qualified immunity defense." (Pet. p. 13.) Mottola premises this claim of conflict on the erroneous assertion that the Second Circuit looks only to its own and Supreme Court precedent to determine whether a constitutional right has been "clearly established," which Mottola claims conflicts with the practice of other Circuits. (Pet. p. 13.) The Second Circuit does not, as Mottola asserts, engage in such a limited practice in determining the existence of "clearly established" law. Accordingly, Mottola's petition should be denied.

Initially, assuming such a conflict exists, which it does not, this Court's decision in Elder v. Holloway, __U.S.__ 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) would have arguably resolved it. The Elder Court explained that,

> 'A court engaging in review of a qualified immunity judgment should therefore use its "full knowledge of its own [and other relevant] precedents." Davis, 468 U.S., at 192, n. 9.' (Emphases added.)

In any event, as discussed above, the Second Circuit does not limit itself to review of its own and Supreme Court precedent to determine whether a constitutional right has been "clearly established." It did not do so in this case and its prior decisions do not create such a restrictive approach. Thus, Mottola can not establish that the Second Circuit's characterization as to what constitutes appropriate sources of

law for determining the existence of "clearly established" constitutional law was in conflict with the decisions he cites. Indeed, the Second Circuit's approach was in accordance with the approach taken by the Circuits identified by Mottola and does not directly conflict with any of the cited approaches. Moreover, consideration of decisions from jurisdictions other than the Second Circuit and the Supreme Court, the approach Mottola claims conflicted with the Second Circuit's, would not change the result in this case.

In Soares v. State of Conn., 8 F.3d 917 (2d Cir. 1993), the Second Circuit looked to its own and Supreme Court precedent, as well as decisions from other circuits to see if the claimed right had been recognized and if the government official would have reasonably understood his actions violated the right in question. In Shabazz v. Coughlin, 852 F.2d 697, 701 (2d Cir. 1988) the Court found that a court must look for the presence of cases "foreshadowing" a ruling on the issue, or cases in other circuits taking a certain stand. In Weaver v. Brenner, 40 F.3d 527 (2d Cir. 1994), the Court reviewed decisions from the Ninth, Fourth and Seventh Circuits in determining the scope of a defendant's rights under Miranda.

In this case, the Court reviewed decisions from the Seventh, Ninth, Sixth and D.C. Circuit Courts of Appeal in discussing the "clearly established" principles of Constitutional law which compelled denial of Mottola's claim. 35 F.3d at 685-686 n. 4, 5, 6 & 8. The Court further reviewed decisions from the Third, Fourth, Fifth, Sixth, Seventh and Tenth Circuit Courts of Appeal and the Southern District of Georgia in determining that "the prohibitions of...[18U.S.C.]section 3105 may be considered in determining "reasonableness" under the Fourth Amendment...." 35 F.3d at 687 and n.9. (App. p. 7a - 13a.)

A brief review of the approaches undertaken by other Circuit Courts of Appeal in the decisions cited by Mottola establishes that the conflict he claims mandates this Court's

review does not in fact exist. Mottola claims the Tenth Circuit's approach is limited to its own and Supreme Court precedent, citing Woodward v. City of Worland, 977 F.2d 1392 (10th Cir.), cert. denied, __U.S.__, 113 S.Ct. 3038, 125 L.Ed.2d 724 (1993). The Woodward Court found, however,

> 'We recently held that "[o]rdinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." [Citation omitted.]'

Other jurisdictions follow a nearly identical approach. In Borucki v. Ryan, 827 F.2d 836 (1st Cir. 1987), the First Circuit, without articulating a test, refers to cases from other jurisdictions insofar as they discuss the right of privacy articulated in cases decided by this Court. In Giuffre v. Bissell, 31 F.3d 1241 (3d Cir. 1994), the Third Circuit does not articulate a test, but surveys Circuit Court decisions regarding a criminal defendant's Fifth Amendment right against self-incrimination under this Court's Miranda decision, without referring to any existing, relevant Third Circuit decision. On another issue related to the right to counsel, the Court cites only to precedents from this Court and its own decisions.

In Doe v. State of Louisiana, 2 F.3d 1412, 1416 (5th Cir.), cert denied, __U.S.__, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994), the Fifth Circuit articulates the following test:

> "[fn]8. In examining preexisting law,
>
> [a]s a general proposition, we will not rigidly define the applicable body of law in determining whether relevant legal rules were clearly established at the time of the conduct at issue. See Harlow v. Fitzgerald [457 U.S. 800 at 818, n. 32] 102 S.Ct. [2727] at 2738, n. 32 [73 L.Ed.2d 396]. Relying solely on Fifth Circuit and Supreme Court cases, for

> example, would be excessively formalistic, but they will loom largest in our inquiries. In determining what the relevant law is, then, a court must necessarily exercise some discretion in determining the relevance of particular law under the facts and circumstances of each case, looking at such factors as the overall weight of authority, and the status of the courts that render substantively relevant decisions, as well as the jurisdiction of the courts that render substantively relevant decisions...[citation omitted]."

In Boswell v. County of Sherburne, 849 F.2d. 1117, 1121 (8th Cir.), cert denied, 488 U.S. 1010, 109 S.Ct. 796, 102 L.Ed.2d 787 (1989), the Eighth Circuit canvasses other Circuit Courts' decisions to address what it considers an "open question," that is whether pre-trial detainees are afforded broader rights to emergency care under the Fourteenth Amendment than convicted criminals. The Court decided it did not need to answer the precise question, in part because this Court had not yet answered the question and the Circuit Courts had provided various responses.

In Donovan v. City of Milwaukee, supra, 17 F.3d at 952, the Seventh Circuit articulates the following test:

> 'In ascertaining whether a particular right has been "clearly established" within the meaning of Harlow, this court has not required binding precedent from the Supreme Court or the Seventh Circuit. Cleveland-Perdue, 881 F.2d at 431. In the absence of controlling authority on point, "we seek to determine whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." Id.'

In Kirkpatrick v. City of Los Angeles, 803 F.2d 485, 490 (9th Cir. 1986), the Ninth Circuit articulates the following test:

> "We start by examining precedent from this court and the Supreme Court to determine if the right was clearly established at the time of Gates' and Aggas' actions. In the absence of binding precedent from this court or the Supreme Court, we look to decisions from other courts to determine if the right was clearly established...[citation omitted]. If we are required to examine decisions from other courts, the likelihood that this court or the Supreme Court would adopt the analysis of the other courts is also part of our inquiry...."

In Hunter v. District of Columbia, 943 F.2d 69, 78 (D.C.Cir. 1991), the D.C. Circuit Court of Appeals does not articulate a test, but canvasses decisions from other courts addressing the scope of the right to be free from excessive non-deadly force by a law enforcement officer. Finally, although not cited in Mottola's Petition, the Sixth Circuit, in the case of Ohio Civil Service Employees Ass'n v. Seiter, 858 F.2d 1171 (6th Cir.), concluded that to find "clearly established law," a court should undertake the following approach: It should first look to binding precedent of the Supreme Court, its own Circuit or itself, then it should look to law from other jurisdictions if that law is clear and foreshadowed by directly applicable authority. The Court noted,

> "Here a mere handful of decisions of other circuit and district courts, which are admittedly novel, cannot form the basis for a clearly established constitutional right in this circuit...."

Id. at 1177-1178.

Although the Eleventh Circuit in Belcher v. City of Foley, 30 F.3d 1390, 1400 (11th Cir. 1994) refused to look at decisions of the Fifth and Ninth Circuits, explaining that, '"we do not mean to imply that the law [of this Circuit] can be clearly established for qualified immunity purposes by non-binding precedent."...[citations omitted]', the Court went on to

distinguish the two other circuit cases; it concluded that even if the other decisions had been of the Eleventh Circuit, they would not have clearly established the law regarding the defendants' conduct in that case. Thus, the language indicating a narrow approach is dicta. This approach further does not conflict intolerably with a review of non-binding precedent from other jurisdictions which would foreshadow a subsequent result in the Eleventh Circuit. The following principle, relied on by this Court to dismiss a writ of certiorari as "improvidently granted" in Layne & Bowler Corp. v. Western Well Works Inc., 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712 (1923), is equally compelling in this case:

> "[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal...."

Accordingly, Mottola has failed to establish the existence of an important question of Federal law requiring this Court's intervention, or an intolerable conflict of law among the Circuit Court of Appeals. See Supreme Court Rule 10.1(a) and (c).

CONCLUSION

For the reasons stated above, Mottola's Petition For Writ of Certiorari should be denied.

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